

OLIVER REDFIELD  
v.  
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-17-A

Decided March 2, 1984

Appeal from a December 8, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) affirming the cancellation of appellant's grazing leases on the Crow Indian Reservation.

Dismissed.

1. Administrative Procedure: Administrative Review--Appeals--  
Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:  
Administrative Appeals: Generally

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

2. Administrative Procedure: Administrative Review--Decisions--  
Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian  
Affairs: Administrative Appeals: Generally

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

3. Rules of Practice: Appeals: Timely Filing

The date of receipt shown on a Postal Service return receipt card will, in the absence of clear proof to the contrary, be presumed to be the date of receipt, and consequently, will control the due date for a notice of appeal.

4. Regulations: Waiver--Rules of Practice: Appeals: Timely Filing

The Board of Indian Appeals does not have the authority to extend the period for filing a notice of appeal or to waive a properly promulgated Departmental regulation.

5. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

Upon the expiration of the 30-day time period for decision established in 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction.

APPEARANCES: Douglas Y. Freeman, Esq., Hardin, Montana, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Oliver Redfield (appellant), an enrolled member of the Crow Indian Tribe (tribe), has sought review by the Board of Indian Appeals (Board) of a December 8, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) canceling lease numbers 0-2311, 0-2892, 0-3695, 0-3696, 0-3697, and 0-3698, covering respectively, allotment numbers 836-T, 3182-T, 1225-T, 1581-T, 3204-T, and 3456-T, totaling 2,631.38 acres on the Crow Indian Reservation in Montana. These leases had been issued to appellant on November 26, 1980, under the Indian preference leasing provisions of Tribal Resolutions 67-15 and 70-40 and the Tribal Land Use Plan of Operations, approved March 3, 1971. The cancellation decision was made because appellant had allegedly permitted unauthorized cattle to graze on the leased tracts. According to the Bureau of Indian Affairs (BIA), appellant failed, when given the opportunity, to show cause why the leases should not be canceled for the alleged violations. For the reasons discussed below, the Board finds that the present appeal must be dismissed.

Background

Appellant is employed as a cowboy by Jack Owens (Owens), a non-Indian rancher who owns land apparently contiguous to the Crow Reservation. In addition, appellant operates a cattle business, grazing his cattle in common with cattle owned by Owens. Appellant owns, leases, or has exchanged the grazing lands used in this operation. The six tracts of tribally owned grazing land which are the subject of the present appeal were part of appellant's business operation.

On July 13 and September 15, 1981, BIA conducted field inspections of appellant's leased lands. According to the BIA reports, the cattle found on the leased tracts bore brands other than those registered to either appellant or Owens. Because BIA interpreted the leases to mean that the lands were restricted to appellant's use, on February 11, 1982, the Acting Superintendent of the Crow Agency ordered appellant to show cause why the leases should not be canceled for failure to comply with the terms of the leases and with the requirements of Tribal Resolutions 67-15 and 70-40 and the Tribal Land Use Plan of Operations, under which the leases were approved.

Appellant responded on February 22, 1982, by presenting an agreement with Owens to run cattle in common. No explanation was offered for the presence of cattle belonging to other individuals. On March 12, 1982, after reviewing appellant's response, the Superintendent concluded that appellant had used the leased lands in an unauthorized manner and canceled the leases. 1/

Appellant appealed this decision on April 7, 1982. The Deputy Area Director, Billings Area Office, BIA, affirmed the decision on April 21, 1982. 2/ Appellant filed a notice of appeal of this affirmance with appellee on May 17, 1982, and submitted a brief on June 16, 1982.

In a December 8, 1982, decision, appellee found that, because the only cattle permitted on the leaseholds were those belonging to appellant and/or Owens, appellant violated paragraph 8 of the leases 3/ by permitting cattle belonging to other persons to be grazed on the leased tracts. Appellee, therefore, upheld the cancellation of appellant's leases and concluded that "[b]ecause this decision is based on the exercise of discretionary authority, it is final for the Department."

On February 15, 1983, appellant filed a notice of appeal with the Board. The Board issued a notice of docketing and preliminary jurisdictional determination on February 22, 1983. The Board found that it appeared to have jurisdiction over the appeal under 25 CFR 2.19(c)(2) because, despite appellee's characterization of the decision as discretionary, it had apparently been based on an interpretation of law.

Appellee did not challenge the Board's finding that it had jurisdiction under section 2.19(c)(2), but by memorandum dated April 15, 1983, alleged that the appeal was untimely and should be dismissed.

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1/ Lease number 0-3695, covering allotment number 1225-T, was not mentioned in the Superintendent's cancellation letter, although it had been included in the show-cause order.

2/ The Deputy Area Director's letter "reincluded" lease number 0-3695 "because the factors which lead to its cancellation were the same as those in all the other leases."

3/ Paragraph 8 of each of the leases is entitled "Unlawful conduct" and reads: "The lessee agrees that he will not use or cause to be used any part of the leased premises for any unlawful conduct or purpose."

On April 22, 1983, the Board established a briefing schedule and specifically requested appellant to respond to appellee's allegation of untimeliness. Appellant filed an opening brief on May 23, 1983, and a supplemental brief on May 26, 1983, addressing both the merits of the appeal and the question of timeliness. No briefs in opposition were submitted.

### Jurisdiction Under 25 CFR 2.19

The Board's preliminary jurisdictional determination was made on the grounds that appellee's decision was apparently incorrectly characterized as based on the exercise of discretion. Under 25 CFR 2.19(c)(1), a decision correctly characterized as discretionary may be final for the Department without Board review. See also 43 CFR 4.330(b)(2). Section 2.19(c)(2), however, provides that a decision based on the interpretation of law is reviewable by the Board.

[1] This issue has recently been addressed in Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146, 91 I.D. 43 (1984). As in Wray, the question presented is whether the determination rendered by appellee involved the exercise of discretion, unhampered by legal rules, or whether it required the application of general legal principles to a particular fact situation, in which event the decision would be based upon an interpretation of law.

[2] BIA's characterization of a decision as discretionary constitutes a legal conclusion, subject to Board review. Wray, supra; Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983); Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142 (1983). A decision correctly characterized as discretionary may normally be made final for the Department without further Board review. <sup>4/</sup> See 43 CFR 4.330(b)(2); Wray, supra; Billings American Indian Council, supra. A decision found to be incorrectly characterized as discretionary or to be based partly on discretion and partly on law, will be reviewed to the extent of the legal conclusions reached. Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982).

In this case appellee was required to decide whether the fact that cattle not belonging either to appellant or to Owens were grazing on lands leased to appellant violated the provisions of the leases and the requirements of Tribal Resolutions 67-15 and 70-40 and the Tribal Land Use Plan of Operations. This decision clearly required legal analysis. The Board's preliminary jurisdictional determination of April 22, 1983, is accordingly affirmed.

### Timeliness

In its April 15, 1983, memorandum to the Board, appellee argues that the appeal should be dismissed because it was not timely filed. The

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<sup>4/</sup> See Wray, supra at 152 n.3, 91 I.D. at 47 n.3.

following facts are relevant to the determination of timeliness. Appellee's decision was dated December 8, 1982. The return receipt card attached to appellant's copy of the decision shows the signature "Oliver Redfield" and a delivery date of December 13, 1982. The envelope in which the decision was sent to appellant shows a first notice date of December 13, 1982, and a later date of, apparently, December 28, 1982. Counsel for appellant states that appellant brought the decision to his office after December 28, 1982, and that he concluded from an examination of the envelope that the notice of appeal was due 60 days from December 28, 1982, or on or before February 26, 1983. Counsel mailed the notice of appeal on February 15, 1983.

[3] According to the date on the return receipt card, the 60-day period for the filing of an appeal with the Board expired on February 11, 1983. The signed return receipt card is the best evidence of date of receipt of the decision and, in the absence of clear proof to the contrary, must be relied upon. Accordingly, appellant's appeal is untimely and should be dismissed.

Appellant contends, however, that the delay in filing should be excused because appellee's incorrect characterization of the decision as discretionary and final for the Department caused him to believe that no further appeal was available. Consequently, he failed to notify his attorney of receipt of the decision. When counsel was subsequently informed of and had an opportunity to study the decision, he determined that an appeal should be available. Appellant argues that he was denied notice that he had a right of appeal and the Board should, therefore, waive or extend the filing deadline.

As discussed, supra, BIA's characterization of a decision as discretionary is reviewable. Furthermore, the characterization of a lease cancellation as discretionary is always suspect. Wray, supra at 154 n.4, 91 I.D. at 48 n.4.

[4] The remedy appellant seeks, however, is not available. Departmental regulations in 43 CFR 4.332(a) clearly provide that "[a] notice of appeal not timely filed shall be dismissed for lack of jurisdiction." There is no authority for extending or waiving this requirement. See 43 CFR 4.334. The court cases cited by appellant as precedent for waiving or extending filing deadlines are not dispositive of a proceeding governed by administrative regulations.

[5] Appellant alternatively argues that appellee's failure to render a decision on his appeal within 30 days from the time the appeal was ripe for decision violated 25 CFR 2.19(a) and that this failure should serve as the basis for the Board's jurisdiction under 25 CFR 2.19(b). The same argument was raised in Wray. As stated there, appellee's failure to render a decision within 30 days from the time when an appeal is ripe for decision violates 25 CFR 2.19(a) and gives the Board jurisdiction over the appeal under section 2.19(b). However, the Board will not exercise that jurisdiction unless and until the appellant formally requests the Board to exercise its jurisdiction. Wray, supra; Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146, 153 (1983). Here, appellant did not seek Board review prior to the issuance of a decision by appellee, and,

consequently, the matter was not properly or timely brought before the Board. Under these circumstances, the Board declines to exercise jurisdiction based on a violation of 25 CFR 2.19(a). 5/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the December 8, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) canceling appellant's leases on the Crow Indian Reservation is dismissed.

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Franklin D. Arness  
Administrative Judge

I concur:

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Bernard V. Parrette  
Chief Administrative Judge

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5/ The dissent in this case concludes that appellee's incorrect characterization of his decision as discretionary and final for the Department constitutes a violation of Federal regulations, the U.S. Constitution, and the Federal trust responsibility to the Indians, all through a denial of due process resulting from the majority's finding that this appeal should be dismissed as untimely without reaching the merits. The dissent, therefore, proposes to reverse the decision and remand it to appellee. Because the only problem with appellee's decision cited by the dissent is the incorrect concluding sentence, appellee on remand would most likely reissue the same decision with a correct concluding sentence. Another appeal would undoubtedly be taken from that decision. At that time, it would appear that the Board would have jurisdiction to rule on the merits of the case. Although not deciding the merits here, the majority notes the record clearly shows that appellant failed to offer a responsive explanation for the violations of his leases alleged in BIA's original show-cause order. Were the majority to reach the merits, the present record supports appellee's decision.

## ADMINISTRATIVE JUDGE MUSKRAT DISSENTING:

In my judgment, this Board errs in dismissing this appeal as untimely. By choosing to dismiss on a procedural technicality, the Board condones the violation, by a Federal agency, of Federal regulations, Federal constitutional rights, and the Federal trust responsibility owed by the United States Government to Indian people. I therefore must vigorously dissent.

## Jurisdiction: Timeliness

On December 8, 1982, the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary, appellee), issued a decision affirming the cancellation of appellant's grazing leases of Indian trust lands. In concluding his letter of decision, appellee issued, allegedly in accordance with 25 CFR 2.19(c)(1), 1/ a closing statement that "[b]ecause this decision is based on the exercise of discretionary authority, it is final for the Department." In so doing, appellee erred.

A lease cancellation decision is not solely the exercise of discretionary authority in that it involves the interpretation of law. Consequently, such a decision is properly the subject of an appeal to the Board of Indian Appeals (Board). Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146, 91 I.D. 43 (1984). Because it is subject to appeal, such a decision is not "final for the Department." See 25 CFR 2.3(b); 43 CFR 4.1(b)(2), 4.21(b), and 4.340. Appellee thus erred in improperly issuing a 2.19(c)(1) closing statement to the effect that the lease cancellation was final and not subject to further appeal; rather, the proper closing statement mandated by 25 CFR 2.19(c) should properly have been that of 2.19(c)(2). 2/

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1/ 25 CFR 2.19 provides:

"§2.19 Action by [Deputy Assistant Secretary]\* on appeal.

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"(c) When the [Deputy Assistant Secretary] renders a written decision on an appeal, he shall include one of the following statements in the written decision:

"(1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.

"(2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals \* \* \*."

(\*The administrative review duties of the Commissioner of Indian Affairs, set forth in 25 CFR Part 2, were assigned to the Deputy Assistant Secretary--Indian Affairs (Operations) by memorandum dated May 15, 1981, and signed by the Assistant Secretary of Indian Affairs.)

2/ The proper closing statement for any decision involving an interpretation of law, including a lease cancellation, is that of 2.19(c)(2) which correctly informs those receiving notice of the decision of the right to appeal. See dissent note 1, supra.

The effect of this 2.19(c) error <sup>3/</sup> was to produce a defective notice with regard to appellant's right to appeal. <sup>4/</sup> Such a defective notice, in turn, violates 25 CFR 2.4.

#### § 2.4 Notice of administrative action.

Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

The lease cancellation decision of appellee is thus subject to the 2.4 notice requirement. The decision is one from which an appeal can be taken (Wray, supra) and appellant is an Indian whose legal rights or privileges are affected. <sup>5/</sup> Appellee thus correctly concluded that as the official making the decision, he was required by section 2.4 to give notice in writing. His letter of December 8, 1982, apparently sought to accomplish this regulatory requirement. However, as previously explained, he erred with regard to the 2.19(c) closing statement and consequently he failed to correctly inform appellant of his right to appeal. Appellee was bound by section 2.4 to give full and complete notice of the actions/decisions he had taken which affected appellant's legal rights or privileges. Because the notice was defective with regard to appellant's right to appeal, appellee failed to give notice in accordance with 25 CFR 2.4.

Violation of the 2.4 notice requirement results in application of the regulation's tolling provisions. According to 2.4, in the event appellee fails to provide effective notice, the appellant's right to appeal is continued for the period set forth by regulation. Section 2.4 thus provides for the tolling of the appeals deadline with the right to appeal being preserved for the period set forth in the Department's appeals regulations. Accordingly, from the date effective notice is received, an appellant must file within 60 days a notice of appeal with the Board of Indian Appeals. 25 CFR 2.19(c)(2); 43 CER 4.332(a).

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<sup>3/</sup> An error in issuing a closing statement pursuant to 25 CFR 2.19 is itself a proper subject of appeal to the Board. The 2.19(c) closing statement is a regulatory requirement based on a legal conclusion. As such, an appeal challenging its correctness or its propriety is within the Board's jurisdiction.

<sup>4/</sup> "To satisfy [the principle of due process] it is not only necessary that the notice reach the parties affected but that it convey the required information." In Re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1103 (5th Cir. 1977).

<sup>5/</sup> Appellant is an enrolled member of the Crow Indian Tribe and lessee of Indian trust lands located on the Crow Indian reservation in Montana.

In the present case, appellant's attorney, after discovering appellee's error and realizing an appeal was proper, filed a notice of appeal with the Board within 60 days of the date of discovery. <sup>6/</sup> Consequently, in accordance with 2.4, the present appeal is not untimely and is properly before the Board.

It is not necessary, however, to reach the merits of the lease cancellation decision itself for it appears prima facie that major violations of Federal regulations, Federal constitutional rights, and the Federal trust responsibility have occurred, any one of which compels this Board to reverse the cancellation and remand this matter to the Bureau of Indian Affairs (BIA, Bureau) for further consideration.

### Violation of Federal Regulations

Appellee, as noted above, erred in issuing a 2.19(c)(1) rather than a 2.19(c)(2) closing statement. This error produced a defective notice prejudicial to appellant and in violation of 25 CFR 2.4. In Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966), the court of appeals reversed and remanded a decision of the Federal Trade Commission for procedural errors in violation of Federal regulations governing agency proceedings which resulted in denial of administrative due process. The court observed:

When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. \* \* \* This is so even when the defined procedures are “\* \* \* generous beyond the requirements that bind such agency \* \* \* For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. \* \* \* If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand. [Citations omitted.]

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<sup>6/</sup> Appellant and appellant's attorney acted reasonably and diligently under the circumstances. Appellant maintains that he was misled by the appellee's letter into believing no further appeal was available. This caused him to delay in notifying his attorney of his receipt of the decision. When counsel was subsequently informed of the decision and had the opportunity to analyze it, he correctly determined that an appeal was proper and warranted. He then forthwith filed a notice of appeal with the Board. (See Appellant's Brief at 11-14.)

The majority chooses to ignore this aspect of appellant's argument and instead focus on the attorney's admitted confusion caused by the discrepancy in postal delivery dates. The mechanical computation of filing deadlines emanating from postal errors misses the point and fails to address the fact that the appeals deadline, according to section 2.4, begins with receipt of effective notice--not with receipt, as in this case, of defective notice.

For examples of administrative appeals decisions recognizing postal and mailing errors as depriving appellants of proper notice, see Betty Alexander, 53 IBLA 139 (Mar. 9, 1981); and Brooks Griggs, 51 IBLA 232, 87 I.D. 612 (Dec. 15, 1980).

Pacific Molasses Co., *supra* at 389-90. See also Alamo Express, Inc. v. United States, 613 F.2d 96 (5th Cir. 1960). In the instant appeal as well, violations of procedural regulations resulting in denial of due process alone suffice to require reversing and remanding this matter to the Bureau of Indian Affairs.

### Violation of Federal Constitutional Rights

In his letter of December 8, 1982, affirming cancellation of appellant's grazing leases, appellee not only failed to inform appellant of his right to appeal, but actually misinformed him. Either of these errors constitutes an effective denial of appellant's right to appeal and therefore deprived appellant of his constitutional right to due process of law.

In Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970), the court of appeals held that the Bureau of Land Management violated due process standards when it gave the plaintiffs erroneous and ambiguous instructions as to their procedural rights and responsibilities in complying with agency regulations. The court specifically found that the agency's letter of decision regarding the plaintiffs' oil and gas offer was ambiguous as to whether the decision was final. This resulted in the effective denial of the plaintiffs' right of appeal and therefore deprived them of due process of law.

The difficulty we see in the Secretary's decision concerns appellant's constitutional right to procedural due process of law. Having established [in the Code of Federal Regulations] a system of appeal, the Secretary is constitutionally bound to administer that system in a manner consistent with established concepts of due process. Due process requires that a party who is adversely affected by a Land Department decision must be afforded proper notice of action to be taken or which has been taken. \* \* \* The due process clause requires that notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. \* \* \* In deciding whether appellants' right to appeal from the decision of the [Bureau of Land Management] was frustrated, the applicable standard is whether the decision was a reasoned conclusion clearly apprising appellants of the action taken, thus enabling them to determine whether their interests were adversely affected. We conclude that the decision did not satisfy due process requirements of notice in two major aspects.

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\* \* \* The second major aspect in which the land office decision was defective was its ambiguity as to whether it was a final decision. \* \* \* [D]ue process is not satisfied by a decision which is subject to several constructions of an element such as finality.

Since the appellants were denied an effective right of appeal and thereby deprived of due process of law, the judgment

of the district court is reversed and the appellants' right to appeal through Interior channels from the land office decision of September 12, 1961, conditionally rejecting their original lease offer is reinstated. [Footnotes and citations omitted.]

Brandt, supra at 56-57.

An even stronger case for reversal and remand lies with the appeal before the Board. Here appellant was incorrectly informed and misled as to his right to appeal. Surely due process is not satisfied if a party entitled to notice as to his rights of appeal is incorrectly informed by the Government and relies to his detriment. A violation of constitutional rights of this magnitude clearly requires this Board to reverse or remand.

More specifically in the context of Indian affairs and directly on point with regard to the present appeal is Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976), where the district court held that termination of a lessee's interests in Indian trust lands without due process violated the lessee's constitutional rights. In Coomes, as here, BIA failed to comply with procedural regulations regarding notice and thereby violated the lessee's rights to due process as guaranteed by the Fifth Amendment of the United States Constitution. The court noted:

The rule is well established that: "An agency of the government must scrupulously observe the rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." \* \* \* This rule is strictly applied when constitutional or statutory rights are violated.

Coomes, supra, at 995. This Board should do likewise.

#### Violation of the Trust Responsibility

In Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation v. Commissioner of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982); disapproved, in part, on other grounds in Robert Burnette v. Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 464, 89 I.D. 609 (1982), this Board reviewed in depth the analytical framework for applying the trust responsibility doctrine. The Board concluded that once the existence of a specific trust responsibility on the part of the United States was established, the concomitant duties of the Federal Government could likewise be determined. In essence, this Board held, with regard to fulfilling duties under the trust responsibility, that the actions of the Federal Government were subject to limitations inhering in a guardianship and to pertinent constitutional restrictions.

That a specific trust responsibility and duty exists on the part of the United States with respect to Indian trust lands is well recognized. In Coomes, supra at 991, the district court found that 25 U.S.C. § 393, which provides the statutory authority for the leasing of Indian trust lands by the United States, created a fiduciary relationship between the Federal Government and the Indian tribes and their members and imposed a strict and distinct

obligation of "guardianship-trust" upon the Secretary of the Interior in his dealings with their land. The Coomes court recognized that the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards." (Emphasis in original.)

In the appeal before us, the actions of the United States as trustee and the BIA as its agent must be judged in accordance with principles of guardianship and pertinent constitutional requirements (including due process considerations). By either criterion, BIA breached its duties and thereby violated the trust responsibility. Under general principles of trust law, the trustee's (*i.e.*, BIA's) duty in transactions with the beneficiary (*i.e.*, appellant lessee) include the following:

If a trustee enters into a legal transaction with his beneficiary by way of contract, conveyance, release, or otherwise, he owes a duty to the cestui to exhibit the utmost fairness, which ordinarily involves disclosure by the trustee to the beneficiary of all relevant facts known to the former, the payment of adequate consideration if no gift was involved, and any other conduct necessary to enable the cestui to act freely and after full consideration. Sometimes independent advice to the beneficiary is a prerequisite to the transaction.

The doctrine is based on the superior position of the trustee, and is applied to other fiduciaries and to those in a confidential relation.

The beneficiary may avoid the transaction unless the trustee can bear the burden of proving its utmost fairness. It is voidable and not void. [7/]

BIA clearly violated this duty as well as the constitutional right to due process which it owed appellant. Such flagrant breaches of duty resulting in such prejudicial injury to appellant constitute such a serious violation of the trust responsibility doctrine as to require reversal and remand.

### Conclusion

Not only is the majority decision in conflict with Federal case law but it also conflicts with the Board's own precedent. In Racquet Drive Estates v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983), this Board held that Department regulations governing the administrative appeals process require due process be accorded to all parties before a lease of Indian trust lands may be canceled. Similarly, in Brewer v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 110, 89 I.D. 488 (1982), the Board held that defective notice by BIA in a

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7/ George G. Bogert, Handbook of the Law of Trusts, § 96 (3d ed. 1952).

lease cancellation procedure results in reversal of the cancellation decision and remand in accordance with Coomes v. Adkinson, *supra*. 8/

The majority opinion itself is wanting. In response to the appellant's defective notice argument, the majority answers "You were wronged but unfortunately the remedy you specifically request [*i.e.*, an extension of the filing time] is not available." This response, I believe, is totally unsatisfactory. It is evasive and the product of an oversimplified analysis. The appellant suffered a legal wrong for which there exists a readily available and appropriate legal remedy--the tolling of the filing deadline via 25 CFR 2.4; the assumption of jurisdiction by the Board, and the reversing and remanding of the lease cancellation decision due to violations of Federal regulations, Federal constitutional rights, and the trust responsibility. The majority, however, has instead chosen to slavishly follow technical rules rather than see that justice is done. The folly of such a course was described by Mr. Justice Black in his dissent in Berman v. United States, 378 U.S. 530, 537-38, 84 S.Ct. 1895, 1899 (1964).

Having several ways in which it could have heard the merits of petitioner's constitutional claim, the Court of Appeals, now followed by this Court I regret to say, chose to interpret the Rules not so as to reach, but rather to defeat, a "just determination" of this case.

Throughout history men have had to suffer from legal systems which worshiped rigid formalities at the expense of justice. It is for this that we remember the Laws of the Medes and Persians and the injustice spawned by the tortuous labyrinth of common-law pleading which it took the creation of courts of equity to counter act. Of course, any civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights growing out of his lawyer's mistake or even negligence in failing to file the proper kind of pleading at precisely the prescribed moment. \* \* \* The Criminal Rules were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply means to an end: the achievement of equal justice for all. I have no doubt that the disposition of this case would have been very congenial to the climate of Baron Parke's day. I confess, however, that I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants. [Citations omitted.]

For the reasons I have set forth, I respectfully dissent.

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Jerry Muskrat  
Administrative Judge

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8/ See also Estate of Richard Evans Walker, 12 IBIA 44 (Oct. 28, 1983), where this Board reversed and remanded a decision by an Administrative Law Judge (Indian Probate) on grounds of defective notice arising from the Administrative Law Judge's own error.